85-1408

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS GAS AND ELECTRIC COMPANY,
Petitioner,

vs.

WILLIAM E. BROCK,
Secretary of Labor,
Respondent,

and

JAMES E. WELLS, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Do the "whistle blower" protection provisions of the Energy Reorganization Act, 42 U.S.C. §5851(a), include as protected activity the filing of an internal quality control report by an employee solely with his own employer?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Kansas Gas and Electric Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 26, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The decision by the Secretary of Labor, which was enforced by the Court of Appeals, appears at Appendix B. The decision by the District Court in a related proceeding appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1985, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §5851(a) provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.] or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceedings, or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the

purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.].

STATEMENT OF CASE

James Wells was an employee hired to perform quality assurance inspections for Kansas Gas and Electric Company (KG&E) at its Wolf Creek Generating Station. The Wolf Creek project is a nuclear powered electric generating station, which is now in operation but which was then under construction near Burlington, Kansas.

On August 29, 1983, Wells filed a complaint with the Department of Labor alleging that he had been discriminated against in violation of 42 U.S.C. §5851(a). The complaint alleged that Wells had been disciplined and discharged because he had brought various quality concerns at Wolf Creek to the attention of management. KG&E responded that Wells' everyday, normal duties required him to identify quality related problems at the plant, that Wells had not been engaged in "whistle blowing" activity of any kind prior to his termination, and that he had been terminated for legitimate reasons.

The case was heard before an administrative law judge from the Department of Labor in January, 1984. The law judge found that even though Wells' quality reports were filed only internally with KG&E management, and not with the Nuclear Regulatory Commission ("NRC") or any other governmental body, such filings constituted a protected activity under the statute for which Wells could not be disciplined or discharged. The judge further found the reasons articulated by KG&E for Wells' dismissal were pretextual.

Thereafter, on June 14, 1984, the Secretary of Labor, acting pursuant to 29 C.F.R. §24.6(b), adopted the findings and conclusions of the administrative law judge in relevant part. The Secretary held:

> "[Wells'] reporting of quality discrepancies and safety problems constitute a protected activity under Section 5851 albeit such reporting was within the scope of [his] official duties as a quality assurance inspector and was communicated only internally and not to NRC."

The Secretary ordered reinstatement and other affirmative relief for Wells.

Pursuant to 42 U.S.C. §5851(c), on August 18, 1984, KG&E petitioned the Tenth Circuit Court of Appeals for review of the Secretary's order. Wells sought and was granted leave to intervene. In a related action, Wells filed a complaint pursuant to 42 U.S.C. §5851(e) in the United States District Court for the District of Kansas seeking enforcement of the Secretary's order. The District Court entered judgment in favor of Wells on November 21, 1984, and KG&E appealed the judgment to the Tenth Circuit where the appeal was consolidated with the already pending petition for review of the Secretary's decision. On December 26, 1985, a panel of the Tenth Circuit issued the opinion and judgment for which the writ of certiorari herein is sought.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Squarely Conflicts With the Opinion of the Fifth Circuit in Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984).

The legal conclusion reached in this case by the Tenth Circuit regarding the proper construction of the Energy

Reorganization Act ("ERA") is contrary to that previously reached by the Fifth Circuit in a case with substantially identical facts and procedural background. *Brown & Root v. Donovan,* 747 F.2d 1029 (5th Cir. 1984). The Tenth Circuit acknowledged the conflict at page 17 of its opinion, as follows:

> "We recognize that a different result was reached in *Brown and Root v. Donovan,* 747 F.2d 1029 (5th Cir. 1984). In our view, the construction of the ERA there employed is incorrect . . . ."

In rejecting the reasoning and result of *Brown & Root,* the Tenth Circuit cited and aligned itself with the Ninth Circuit, which prior to the holding in *Brown & Root* had held that the filing of a purely internal safety complaint was an activity intended to be protected by the statute. *Mackowiak v. University Nuclear Systems,* 735 F.2d 1159, 1163 (9th Cir. 1984).

In *Brown & Root,* the Fifth Circuit directly addressed and acknowledged its disagreement with the result of the Ninth Circuit in *Mackowiak.* The Fifth Circuit expressly rejected the *Mackowiak* rationale and fully explained the basis for its contrary statutory construction. Therefore, the conflict between the Circuits is direct and complete and certiorari to resolve the conflict is warranted.

II. The Issue of Statutory Construction Raised Is Important, Fundamental and Recurring and Needs to Be Resolved.

Three cases involving employees allegedly discriminated against on nuclear projects for purely internal, intracorporate quality complaints have reached the courts of appeals since 1984. There was another such complaint raised in *Consolidated Edison Company of New York, Inc.*

v. Donovan, 673 F.2d 61 (2nd Cir. 1982), and there was an issue raised about solely internal complaints in *Wheeler v. Caterpillar Tractor Co.*, (Ill. Sup. Ct. No. 60181, 54 U.S. L.W. 2237-38, Nov. 5, 1985). Given the continuing construction and operation of nuclear power projects, there is reason to expect that what has been a contested issue will continue to be a contested issue, especially in view of the split in authority among the circuits. As it now stands, nuclear projects operating within the jurisdiction of the Fifth Circuit are governed by a radically different statutory interpretation than projects operating within the jurisdiction of the Ninth and Tenth Circuits. This presents obvious problems for the agencies charged with enforcing the statute as well as for those that must comply with the statute. For example, the Fourth Region of the NRC covers areas within the jurisdiction of both the Fifth and Tenth Circuits so the agency must apply the law differently even within one of its own administrative regions.

As a practical matter, only the resolution of this threshold coverage issue by this Court can avoid needless litigation before the administrative agencies, the District Courts and the Courts of Appeals. The potential for needless litigation is increased because the enforcing agencies favor the result of the Tenth and Ninth Circuits but the best reasoned analysis lies in the Fifth Circuit's opinion. As noted in the following points, the construction given 42 U.S.C. §5851(a) by the Fifth Circuit in *Brown & Root* is correct and that the construction given by the Ninth and Tenth Circuits is not correct.

1. Looking first to the language used by Congress, it is apparent that the activities intended to be protected are (1) commencing a proceeding under the Act, (2) testifying in such a proceeding or (3) assisting or participating

in such a proceeding. The statutory language does not hint at intending to protect purely internal, intracorporate filings or complaints by employees, even though such would have been an obvious issue as of the time of drafting and could easily have been added had it been intended.

2. It is a very large leap to go from protecting "whistle blowers" who initiate, testify or participate in NRC proceedings, which is the express intent of the statute, to protecting every employee who raises with an employer an alleged safety or quality concern about a nuclear project. If Congress had intended to protect internal communications, there would have been no reason for Congress to have so specifically articulated the three categories of protected activity set forth. For example, Congress simply could have provided that:

> "It shall be unlawful for an employer to discriminate against an employee because the employee has raised or is about to raise a work quality or safety concern about a project within the jurisdiction of the Nuclear Regulatory Commission."

Instead, Congress specifically categorized three kinds of protected "whistle blower" activities, none of which were involved in the case at hand. By expressly setting forth certain types of activities as protected, Congress demonstrated that it was balancing the rights of employees and employers and protecting some but not all employee activity. It is improper for the agencies or the courts to abolish the congressional policy and destroy the balance.

3. As noted in *Brown & Root*, in addition to the language used, "[t]he structure of the ERA indicates that section 5851(a) is designed solely to protect from retaliation corporate 'whistle blowers' who inform responsible officials of corporate failings." 747 F.2d at 1031 (See dis-

cussion and analysis by Fifth Circuit at 747 F.2d 1034-1035.) Also as noted by the Fifth Circuit, there are a number of other powerful incentives provided by the Energy Reorganization Act to discourage employers from ignoring meritorious safety issues raised by employees, including criminal penalties for corporate officials, civil penalties for the employer, and, ultimately, the denial, suspension or revocation of an operating license by the NRC. In an industry already regulated by detailed and comprehensive procedures, there is no justification to read into a statute that which is not there.

4. The legislative history for the ERA supports the position of the Fifth Circuit and not that of the Tenth Circuit. The Report of the Senate Committee provides that:

> "This section offers protection to employees who believe they have been fired or discriminated against as a result of the fact that they have *testified, given evidence or brought suit* [under the Acts]." S.Rep. No. 848, 95th Cong., 2d Sess. 29 (1978), U.S.Code Cong. & Admin. News 1978, p. 7303 (emphasis supplied).

Similarly, the Conference Committee Report describes the purpose of the section as follows:

> "The Senate Bill amended the Energy Reorganization Act of 1974 to provide protection to employees . . . for *taking part or assisting in administrative or legal proceedings* of the Nuclear Regulatory Commission. The House amendment contained no similar provision, and the conferees agreed to the Senate provision." H.R.Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), U.S.Code Cong. & Admin. News 1978, pp. 7303, 7309 (emphasis supplied).

Given the critical difference between what the statute on its face actually says and what the Tenth Circuit holds it was intended to include, it is significant that not a single member of Congress spoke to the issue and that there is not a word of legislative history directly supporting the Tenth Circuit's view. Such might not be surprising if what were involved was a side issue in a complicated piece of legislation, but what the Tenth Circuit held to have been *tacitly* included here is something much larger and more controversial than the whole of what was actually adopted.

5. The Tenth Circuit holds that the Fifth Circuit's construction in *Brown & Root* "is incorrect because it takes no notice of agency regulations." Yet, the agency regulation cited by the Tenth Circuit in no way undermines the rationale of the Fifth Circuit. *See* 10 C.F.R. §50.7 (1985). The regulation simply makes it clear that employee contact with the NRC is protected activity even if no formal proceedings result from that contact, but that says nothing regarding the issue in dispute here where there was no contact or threatened contact of any kind with the NRC.

The issue raised by the different constructions given section 5851(a) by the Fifth Circuit on the one hand and the Ninth and Tenth Circuits on the other clearly focuses the fundamental question at issue. There are no gray areas at issue. Either purely internal filings are protected by the statute or they are not. If so, the protection should extend to employees within the jurisdiction of the Fifth Circuit. If not, the position of the Ninth and Tenth Circuits should be reversed. This Court needs to provide guidance on the issue.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed December 26, 1985)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-2114 & 84-2735

KANSAS GAS & ELECTRIC COMPANY,
Petitioner/Appellant,

v.

WILLIAM E. BROCK, Secretary of Labor,
Respondent/Appellee,

and

JAMES E. WELLS, JR.,
Intervenor-Respondent,

UNITED STATES NUCLEAR REGULATORY COMMISSION, GOVERNMENT ACCOUNTABILITY PROJECT, NUCLEAR UTILITIES,
Amicus-Curiae,

and

JAMES E. WELLS, JR.,
Plaintiff-Appellee,

v.

KANSAS GAS & ELECTRIC COMPANY and its WOLF CREEK GENERATING PLANT,
Defendants-Appellants.

PETITION FOR REVIEW OF AN ORDER OF THE DEPARTMENT OF LABOR AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. NO. 84-2290)

Stanley E. Craven of Spencer, Fane, Britt & Browne (David L. Wing, Kansas City, Missouri, and Mark A. Vining and Ralph B. Foster, Kansas Gas and Electric Company, Wichita, Kansas, with him on the briefs), Kansas City, Missouri, Attorneys for Petitioner/Appellant.

Dale W. Bell of Guy, Helbert, Bell & Smith (Michael D. Helbert with him on the brief), Emporia, Kansas, and Allen H. Feldman (Francis X. Lilly, Solicitor of Labor, Karen I. Ward, Associate Solicitor, and Edward D. Sieger, Attorney, with him on the brief), U.S. Department of Labor, Washington, D.C., Attorneys for Respondent/Appellee.

William H. Briggs, Jr., Solicitor, E. Leo Slaggie, Deputy Solicitor, Martin G. Malsch, Deputy General Counsel, and C. Sebastian Aloot, Attorney, U.S. Nuclear Regulatory Commission, Washington, D.C., for the Amicus Nuclear Regulatory Commission.

Nicholas S. Reynolds, Joseph B. Knotts, Jr., Richard K. Walker, and David A. Repka of BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS, Washington, D.C., for Amicus Nuclear Utilities.

George A. Shohet, Stephen M. Kohn, and Thomas M. Devine, Government Accountability Project, Washington, D.C., on the brief for Amicus Government Accountability Project.

Before BARRETT and MOORE, Circuit Judges, and CHILSON*, District Judge.

JAMES E. BARRETT, Circuit Judge.

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*The Honorable Hatfield Chilson, United States District Judge for the District of Colorado, sitting by designation.

Two related matters, Nos. 84-2114 and 84-2735, are presented on appeal. The first, No. 84-2114, is a petition for review of an order by the Secretary of Labor concerning the discharge of a Kansas Gas & Electric (KG&E) employee, James Wells. The second matter, No. 84-2735, is KG&E's appeal from the district court's enforcement of the Secretary's remedial order on behalf of James Wells.

FACTS

KG&E is the managing partner and owner of a 47% interest in the Wolf Creek Generating Station, a nuclear power plant. James E. Wells was hired by KG&E as a quality assurance inspector. Wells' duties consisted primarily of inspecting equipment and lines that had been manufactured by a sub-contractor of KG&E before these items were integrated into the plant. If inspections uncovered discrepancies or inferior work, Wells was to submit written reports of these deficiencies to his superiors. Although run by the licensee (KG&E), this quality assurance program is required by Nuclear Regulatory Commission (NRC) regulations. 10 C.F.R. §50 App. B (II) (1985). The program serves as an adjunct inspection program during the construction and operating phases of a nuclear facility.

A properly functioning licensee quality assurance program is an integral part of the NRC's regulatory program.

"Quality control inspectors play a crucial role in the NRC's regulatory scheme. The NRC regulations require licensees and their contractors and sub-contractors to give inspectors the authority and organizational freedom required to fulfill their role of independent observers of the construction process." *Mackowiak v. University Nuclear Systems,* 735 F.2d 1159, 1163 (9th Cir. 1984). In effect, such a program serves as the eyes and ears of the NRC because the inspectors are always on site and take over much of the inspection burden from federal personnel. *In the Matter of Consumer's Power Co.,* 7 AEC 7, 11 (1974). The observations and judgments of quality assurance personnel on potential construction deficiencies are documented and that documentation is preserved and facilitates NRC audits. The inspection team of which Wells was a part was established to comply with these regulations. The team was also established in response to a previous NRC investigation in which KG&E was cited for a violation and fined. (Tr. 366, 572-73.)

During his employment with KG&E, Wells performed inspections and filed reports with his superiors detailing potential quality assurance problems. On June 20, 1983, Wells reported safety problems. That same day, Wells was told that he was terminated because he could not get along with his co-workers. (Tr. 405, 452.) Wells protested, claiming this lack of cooperation was merely a pretext and that the real reason that he was being fired was for voicing safety concerns. After a brief discussion, Wells' superiors decided to give him a second chance and re-instated him. (Tr. 53-57, 402-403.) Wells continued to file reports of safety concerns.

In early August, 1983, Wells again filed a safety report. Again he was called to speak with his supervisor.

At this meeting, Wells was told that a routine background investigation had been conducted and several of his qualifications had proved difficult to verify. Wells was told that he had 48 hours to produce documentation of these items or face discharge. Wells was unable to secure the documentation within the allotted time and he was fired. He was, however, able to produce the requested paperwork within two weeks at which time he requested that he be rehired. KG&E refused. It was subsequently learned that KG&E had had difficulty verifying certain background information of other employees who held positions similar to Wells, but they had not been discharged.

Suspecting that he had been a victim of discrimination, Wells contacted the NRC. Wells was told that the Department of Labor (DOL) handled employment discrimination claims. Consequently, he referred his grievance to the Department of Labor.

DOL conducted an investigation and subsequently, a hearing was held before an administrative law judge (ALJ). Wells was found to have been fired for filing internal safety complaints. KG&E was ordered to reinstate Wells and to compensate him with back pay, attorney's fees, and costs. The ALJ's decision was appealed to the Secretary of Labor (Secretary). The Secretary adopted the ALJ's decision and order with minor modifications. KG&E petitions for a review of this decision and order of the Secretary.

Thereafter, Wells filed a complaint in the United States District Court requesting enforcement of the Secretary's order. KG&E also filed a motion to stay proceedings pending administrative action. A motion was also filed with the Secretary to hear evidence on the remedial issues—specifically, the amount of back pay awarded

to Wells. The district court denied the stay and also refused to remand. The Secretary of Labor had also denied relief from the amount awarded, finding that he had no jurisdiction because the case was on appeal to this court. The Secretary observed that only this court had authority over the matter.

On appeal, KG&E raises the following issues: (1) whether James Wells engaged in protected activity under 42 U.S.C. § 5851(a) when he filed internal safety reports; (2) whether substantial evidence supports the Secretary's findings that Wells was discharged in retaliation for filing his safety reports, i.e., KG&E's reasons for the discharge were pretextual; (3) whether KG&E waived its right to raise remedial issues; and (4) whether the district court erred by refusing to take jurisdiction over the remedial issues raised by KG&E or, in the alternative, erred by refusing to remand the proceedings for review of such issues to the Secretary of Labor.

I. Jurisdiction

Although not addressed in the briefs of the parties, the panel is troubled by a jurisdictional question. At oral argument it appeared that to this panel that the Secretary of Labor should not be involved with matters pertaining to nuclear safety, such matters more appropriately coming within the expertise of the NRC.

Jurisdiction of the Secretary is claimed under 42 U.S.C. § 5851, which is part of the Energy Reorganization Act (ERA). This Act deals with functions of the Nuclear Regulatory Commission. However, section 5851 of the ERA states that exclusive jurisdiction in employment discrimination matters is vested by Congress in the Secretary of Labor:

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.] or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceedings or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.).

(b) Complaint, filing and notification

(1) *Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may,* within thirty days after such violation occurs, file (or have any person file on his behalf) *a complaint with the Secretary of Labor*

> (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission. (emphasis added).

Believing he was entitled to protection as outlined in section 5851, Wells wrote a letter detailing his situation to the Secretary. This letter, though informal in nature, is equivalent to the filing of a formal legal complaint. 29 C.F.R. §24.3 (1985). This Department of Labor regulation defines what form such a "complaint" must take: "[N]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." This section is introduced by the following: "This part implements the several federal employee protection provisions for which the Secretary of Labor has been given responsibility pursuant to the following statutes: . . . Energy Reorganization Act of 1974, 42 U.S.C. 5851." 29 C.F.R. §24.1(a) (1985). By writing this letter Wells brought himself into compliance with the initiation of an investigation by the Secretary.

It is clear that what is involved here is a complaint concerning employment discrimination, a matter within the competence of the Secretary. It is foreseeable, however, that intertwined with an employment discrimination complaint could be matters specifically concerning substantive questions of nuclear safety which are better determined by the NRC, a body with competence on nuclear issues.

Upon researching this jurisdictional maze, we believe that jurisdiction over employment matters resides in the

Secretary of Labor and that the NRC is not free to accept jurisdiction of these matters concurrently or in its discretion. However, to safeguard the rights of all parties involved in such an employment proceeding, a memorandum of understanding between DOL and NRC concerning employee protection has been signed. See 47 Fed. Reg. 54585 (1982). The memorandum in effect recognizes that DOL is to investigate and conduct hearings on employee complaints and can order a violator to abate the violation. The NRC does not have direct authority to provide the employee with a remedy. DOL is to notify the NRC of any complaint filed with DOL alleging discrimination under the ERA. DOL will also notify the NRC of any hearings on the complaint. Each agency agrees to exchange information concerning any particular allegation. This seems to adequately provide for technical advice to be given to the DOL in the event that technical considerations form part of an employment complaint.

Section 5851 of the ERA vests jurisdiction over employee discrimination matters in the Secretary of Labor. This is clear from the statutory language. In the event that substantial questions involving competence in nuclear energy are involved, the NRC may provide technical assistance to the Secretary pursuant to the memorandum of understanding between the two agencies. We conclude that the matter before us was properly before the Secretary of Labor.

II. Protected Action

KG&E contends that the protection of section 5851 does not encompass the actions, i.e., filing of internal safety complaints, taken by Wells. KG&E argues that Congress envisioned only contacts with governmental

agencies to be protected. The company asserts that if the statute is read so as to include internal complaints, then a fundamental facet of the employer/employee relationship is infringed. The statute, however, does not extend its protection to those who try to abuse the protection by filing frivolous complaints. 42 U.S.C. §5851(g).

The Secretary of Labor, on the other hand, argues that the language and the legislative history of the ERA requires an expansive reading to facilitate the remedial purposes of the Act. Each side cites the same statutory language and the same legislative history to support its interpretation of section 5851. Although each side also relies on precedent from other circuits, the results from other courts are not in agreement about the correct construction of section 5851. The Secretary of Labor, after hearings, found that this legislation is due a broad reading; a narrow interpretation would simply frustrate its aims.

We must first determine the appropriate standard of review of the Secretary's statutory interpretation. The most recent pronouncements of this court hold that an agency's interpretation of its enabling statute is entitled to deference. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1415 (10th Cir. 1984); *Hoover and Bracken Energies v. United States Department of Interior*, 723 F.2d 1488, 1489 (10th Cir. 1983), *cert. denied*, 105 S. Ct. 93 (1984). However, this court has not blindly adhered to this rule. Such deference may be tempered if a different construction is plainly required after an evaluation of the administrative position. *Philadelphia Gear Corp. v. F.D.I.C.*, 751 F.2d 1131, 1135 (10th Cir. 1984) *cert. granted*, 106 S. Ct. 245 (1985); *Nevada Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983).

The administrative position follows. The Secretary found that Wells engaged in a protected activity. The Secretary relied on *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159, 1163 (9th Cir. 1984), which held *inter alia* ". . . that § 5851 protects quality control inspectors from retaliation based on internal safety and quality control complaints." The Secretary found that the language of the statute was clear in extending coverage to internal activities and, in any event, that the legislative intent was unquestionable in this regard. Even though we are of the view that the Secretary has reached the correct result, the following analysis will hopefully provide guidance to the parties.

At the outset, we will examine the pertinent language of the statute. (See *supra*, p. 6, 7). It is a basic tenet of statutory construction that if statutory language is clear and unambiguous on its face then it must be given its plain meaning and no resort to the underlying legislative history is appropriate. *Nevada Power Company, supra,* at 920. Here a disagreement has arisen over the extent of protection provided by section 5851 and the exact meaning of the language "proceeding or any other action. . . ."

The meaning of the provision is rendered unclear inasmuch as the statute does not include definitions of the pertinent terms. At least two reasonable interpretations of this language are possible. First, KG&E argues that "proceeding" should be narrowly interpreted to mean only formal legal proceedings, i.e., agency actions against an alleged violator, and "any other action, is merely another way of saying proceeding." Alternatively, the Secretary argues that this language should not be taken out of context but should be read in light of the overall goal of employee protection. Further, the Secretary asserts that

the filing of a "complaint, will initiate a proceeding." We note that the Secretary's interpretation is consistent with the definition of "complaint" as found in the agency's regulations. The Secretary contends that quality control inspectors initiate a proceeding when they file internal safety reports with their superiors because each inspector is individually charged with enforcing NRC regulations and such a report is the first step in the initiation of an enforcement proceeding. As in *Train v. National Resources Defense Council*, 421 U.S. 60, 63 (1974), this case "presents an issue of statutory construction which is illuminated by the anatomy of the statute itself, by its legislative history . . ." and by the policy underlying the statute.

Section 5851 of the ERA was added to the Act in 1978. It was patterned after similar provisions in other acts. The Senate report on the ERA amendment comments that,

> [t]his amendment is substantially identical to provisions in the Clear Air Act and the Federal Water Pollution Control Act. The legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and a similar provision in Public Law 91-173 (FMSA) relating to the health and safety of the Nation's coal miners.

S. Rep. No. 848, 95th Cong., 2nd Sess. at 29, 1978 U.S. Code Cong. & Ad. News at 7303.

The employee protections of the NLRA and the Federal Mining Safety Act (FMSA) have been construed often and the teachings of those cases are instructive. The cases stand for the general proposition that internal actions taken by an employee do come within the purview of employee protection as guaranteed by the respective Acts. *NLRB v. Schrivener*, 405 U.S. 117 (1972); *NLRB v. Retail*

Employees Union, Local 876, 570 F.2d 586 (6th Cir.), *cert. denied,* 439 U.S. 819 (1978) where an employee was protected when she expressed unwillingness to her employer to testify in accordance with her employer's wishes in an NLRB hearing. The employee, however, did not actually testify; *Phillips v. Interior Board of Mine Operations Appeals,* 500 F.2d 772, 779 (C.A.D.C. 1974) *cert. denied,* 420 U.S. 938 (1975), where the employee notified his foreman of possible dangers in the workplace; this was held to be instituting a proceeding, entitling the employee to the Act's coverage.

Senate Report No. 848 specifically states that section 5851 was patterned after similar employee protection provisions in other acts. Even so, KG&E contends that reliance on any FMSA cases is misplaced because the employee protection provision of that Act was amended in 1977.[1] The FMSA amendment of 1977 changed the language of the provision to expressly include internal complaints: "No person shall . . . discriminate against . . . any miner . . . who has made a complaint . . . including a complaint notifying the operator or the operator's agent. . . ." 30 U.S.C. § 815 (c)(1). KG&E argues that inasmuch as the FMSA was amended in 1977 and the ERA was enacted in 1978 then, if the legislative draftsmen had intended to include internal complaints, they certainly knew how to say so. However, the legislative history of the FMSA amendment shows that Congress did, in fact, intend the older version of the amendment to afford protection to internal complaints and the older version of the amendment is what the ERA provision was modeled after. "The committee intends to insure the *continuing* vitality of various judicial interpretations of § 110 of the

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1. FMSA cases often yield fact situations similar to those encountered under the ERA.

Coal Act which are consistent with the broad protections of the bill's provisions; see e.g., *Phillips v. IBMA,* 500 F.2d 772; *Munsey v. Morton,* 507 F.2d 1202." S. Rep. No. 186, 36, 95th Cong. 1st Sess. 1977, U.S. Code Cong. 2nd Ad. News, 3436. (emphasis added). Both the *Phillips* and *Munsey* cases unequivocably stand for the proposition that internal activities are to be protected under the original version of the FMSA. Thus, it is clear that Congress was advocating the protection of internal action and changed the statutory language not because its intent had changed, but because this intent had been incorrectly perceived by certain courts. We further observe that the legislative history of the ERA points out that § 5851 is modeled after similar provisions in several other acts, not simply the FMSA. The provisions of the other acts have broad remedial purposes and have been so construed by the courts.

The *Mackowiak* court held that "[these acts] share a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak, supra* at 1163. The ERA's legislative history strongly supports this interpretation.

> Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act.
>
> Any worker who is called upon to testify or who gives information with respect to an alleged violation of the Atomic Energy Act or a related law by his employer or who files or institutes any proceeding to enforce such law against an employer may be subject to discrimination. This section would prohibit any firing or discrimination and would provide an administrative procedure under which the employee

or his representative could seek redress for any violation of this prohibition.

S. Rep. No. 848, 95th Cong., 2nd Sess. at 29.

The regulations promulgated by the NRC further echo the broad reading intended:

> Employee Protection
>
> Discrimination by a Commission licensee, permitee, and applicant for a Commission license or permit, or a contractor or subcontractor of a commission licensee, permitee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. The protected activities are established in § 210 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Commission Act or the Energy Reorganization Act. (1) *the protected activities include but are not limited to:* (i) providing the Commission information about possible violations of requirements imposed under either of the above statutes; (ii) requesting the Commission to institute action against his or her employer for the administration or the enforcement of these requirements; or (iii) testifying in any Commission proceeding. (2) *These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.* (Emphasis added).

10 C.F.R. §50.7 (1985). These regulations are controlling and entitled to great weight if reasonable. *Donovan v. Hahner, Foreman, and Harness, Inc.*, 736 F.2d 1421, 1425

(10th Cir. 1984). The regulations make it clear that a formal proceeding is not required in order to invoke the protection of the Act.

In our view, a narrow, hyper-technical reading of § 5851 will do little to effect the statute's aim of protection. KG&E seems to imply that Wells would be entitled to protection only if he had personally filed a formal complaint with the NRC. However, KG&E fails to take into account the memorandum of understanding between DOL and NRC. (See *supra*, p. 8). That memorandum requires DOL to forward a copy of a complaint with supporting documentation to the NRC. It would be redundant for Wells to send the NRC copies of his internal safety complaints when DOL has already provided the NRC with these reports.

We believe that the construction given to section 5851 by the *Mackowiak* court accurately reflects the intent of Congress. We recognize that a different result was reached in *Brown and Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). In our view, the construction of the ERA there employed is incorrect because it takes no notice of the agency regulations, tries to liken the term "action" as synonomous with "proceeding," contends that such employment determinations are outside the competence of the Secretary of Labor because matters concerning nuclear safety are exclusively involved, and discovers nothing in the legislative history to support a broad construction of section 5851. The *Brown and Root* court also discounts *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982), which stands for the proposition that wholly internal complaints are protected by section 5851. *Brown and Root* contains the comment that both parties in *Consolidated Edison* did not dispute

the coverage of section 5851; thus, the court concludes that the case had little precedential value because the court did not challenge the parties' interpretation of section 5851. The most recent pronouncement of the meaning of section 5851 is found in *Wheeler v. Caterpillar Tractor Co.*, (Ill. Sup. Ct. No. 60181, 54 U.S.L.W. 2237-38, Nov. 5, 1985), where the court also construed the remedial purposes of the ERA broadly in a case involving the filing of internal complaints.

III. Sufficiency of Evidence

KG&E challenges the Secretary's decision on the basis of the sufficiency of the evidence. The Secretary cited the following evidence in support of his decision that Wells' firing was pretextual:

> The failure of KG&E to offer any counsel or warning prior to the June 2, 1983 meeting at which it planned to dismiss complainant, the dispirate treatment accorded another employee who did not meet the educational prerequisites for employment with KG&E, the short period of time allowed complainant to produce the documentation as to his Calhoun College credits and his Daniel's employment, and the curtailment of that period, the significance of Reeves' (Wells' supervisor) removal of complainant's discrepancy report from the typing box and the date stamping thereof, and the refusal of KG&E to re-employ complainant.

In the matter of James E. Wells, Jr., 83-ERA-12, 11 (1984). After a thorough review of the record, we hold that there was ample evidence to support the Secretary's findings.

IV. Waiver of Objections to Remedial Measures

In August, 1983, Wells filed his complaint with the Department of Labor alleging retaliatory discharge. Pur-

suant to the ERA, the DOL conducted its own investigation of the matter. In September, 1983, the DOL Compliance Officer issued her findings and recommendations for relief. Included in these recommendations were the following: "The employer should be advised to restore Wells to his job, pay lost wages for the period he has been off work, and expenses incurred by him." (Tr. 244-47.)

KG&E requested a formal administrative hearing before an ALJ. This hearing took place in mid-January, 1984. The ALJ's Decision and Order was issued on February 27, 1984. The Order contained relief nearly identical to the relief recommended by the DOL. This order was appealed to the Secretary of Labor who affirmed the ALJ's order in mid-June, 1984. In addition to his consideration of the record, the Secretary also had the benefit of the post-hearing briefs of the parties. Wells filed an enforcement action with the district court in July, 1984, in an attempt to compel KG&E to comply with the Secretary's orders for re-instatement and back pay. It was not until October, 1984, however, that KG&E filed a motion with the Secretary to request the re-opening of the proceedings to take evidence on the remedial orders. KG&E contends that at all times Wells knew that his position as a quality assurance inspector was to be terminated on or about May 11, 1984. Consequently, KG&E argues that the Secretary's order is inappropriate relief and, at the very least, the order should be vacated by this court and remanded to the administrative agency so that evidence on the duration of Wells' employment may be presented.

Although the record made before the ALJ on this issue is sparse, it does contain Wells' statement that he was told when he was hired that his position would probably end in May, 1984. Wells argues that it was the re-

sponsibility of KG&E to make an adequate record on this matter and because KG&E has not done so, its objections to the relief fashioned have been waived. KG&E counters that at the time the record was made—January, 1984—it had no reason to believe that the duration of the position would pose problems. KG&E apparently was certain that the Secretary would render his decision well before the projected termination date and KG&E therefore took no action. KG&E claims that its actions do not amount to a waiver.

The troublesome part of KG&E's argument is that even if it was not apprised that the exact nature of appropriate relief was an issue prior to May 11, 1984, it does not explain how it could have believed that it was not an issue after that time. The ALJ's order contained no dates to indicate the amount of back pay Wells was due or the period of time for which Wells was to be reinstated. Thus, although it is possible that KG&E believed that it would only be obligated to Wells until May 11, 1984, it is difficult to understand how KG&E remained under this delusion after May 11, 1984. Between May 11 and June 14, 1984, when the Secretary's order was issued, KG&E made no attempt to petition the Secretary or the agency to determine or contest the exact nature of the relief; in fact, not until October, 1984, when KG&E was ordered by the district court to carry out the proposed relief did KG&E request that the Secretary take evidence on the remedial measures.

KG&E's appeal to this court on this issue and to the Secretary is untimely. *Osteopathic Hospital Founders Ass'n v. NLRB*, 618 F.2d 633, 639 (10th Cir. 1980). On May 11, 1984, KG&E certainly was put on notice that an issue existed. It was KG&E's duty to petition the

Secretary to take evidence on the issue while the Secretary was able to act on the matter. We will not consider contentions not presented to the Secretary, absent exceptional circumstances. *Wilson v. Hodel*, 758 F.2d 1369, 1379 (10th Cir. 1985). No exceptional circumstances exist here. KG&E followed an incorrect course. Even as of May 4, 1985, the date KG&E's reply brief was filed, it does not seem that KG&E was cognizant of its error, for it stated in its brief: "[I]t is difficult to determine how KG&E should have proceeded differently." (Petitioner's Reply Brief at 12). In the Secretary's brief it was asserted that KG&E should have requested further hearings from the Secretary on the reinstatement issue. KG&E responds, "we do not believe KG&E can be faulted for not doing this [requesting a hearing] nor do we believe it would have been realistic to have expected the Secretary to have reopened the record at that point on the narrow remedial issue presented." *Id.* KG&E seems to admit that it simply did not believe that the issue was important and thus overlooked it. Inasmuch as the contentions were not raised at the appropriate time they are deemed to have been waived. *Osteopathic Hospitals, supra,* at 639, 640.

KG&E further complains that the district court could have entertained evidence on the remedial issue during the enforcement action. The statutory language is clear that the district court shall enforce the Secretary's orders, and that this duty is a ministerial one. 42 U.S.C. 5851(d). An appeal from the Secretary's decision can lie only with the court of appeals. 42 U.S.C. 5851(c)(1).

In No. 84-2114, we ENFORCE the Secretary's order on the merits in favor of Wells. In No. 84-2735, we AFFIRM the district court's order enforcing the Secretary's remedial order entered on behalf of Wells.

APPENDIX B

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

Case No. 83-ERA-12

In the Matter of

James E. Wells, Jr.
Complainant

v.

Kansas Gas and Electric Company and its Wolf Creek Nuclear Generating Plant in Burlington, Kansas,
Respondent

This is a proceeding arising under section 5851 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851, and regulations promulgated thereunder at 29 CFR Part 24. This section prohibits employers from discriminating in terms, conditions or privileges of employment against any of their employees because the employee has engaged in protected activities.

This proceeding was initiated as a result of a complaint filed, on August 29, 1983, by James E. Wells, a contract employee performing quality assurance inspection at the Wolfcreek plant of Kansas Gas and Electric Company (KG&E). The Wolfcreek plant is an electric generating station powered by nuclear fuel, and an applicant-licensee of the Nuclear Regulatory Commission (NRC). The complaint alleges that Wells was disciplined, discharged and refused re-employment because he had

brought to the attention of KG&E's Quality Assurance Manager various safety problems relating to electric hardware and electrical installations at the plant. In response to the complaint, KG&E contends that complainant was not engaged in a protected activity because it was part of his job to identify for management quality related problems, and because he never had any contact with NRC until after his termination. KG&E also contends that it discharged complainant for legitimate, non-discriminatory business reasons - namely, complainant's failure to verify a part of his employment and educational background coupled both with the inability of complainant to establish good working relationships with co-workers and others, and the fact that complainant damaged one of the office telephones.

A hearing[1] was held before Judge Melvin Warshaw on January 12, 13 and 20, 1984. On February 27, 1984, Judge Warshaw issued his Recommended Decision and Order (D&O) in which he found that complainant was engaged in a protected activity and that KG&E's stated reasons for the action it took against complainant were pretextual. Accordingly, Judge Warshaw recommended that KG&E be found in violation of section 5851.

Pursuant to 29 CFR 24.6(b), this matter is now before me for decision. After review of the entire record, including the arguments set forth by the parties in their post-hearing briefs, I adopt Judge Warshaw's recommended decision with the modifications and additions noted below.

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1. In accordance with the requirements of 29 CFR Part 24, the complaint was first investigated by the Wage and Hour Division, U.S. Department of Labor, which directed KG&E to reinstate complainant and to take other remedial action. Subsequently, at KG&E's request, the case was referred for a *de novo* formal hearing on the record.

The facts of this case are set forth fully in detail in Judge Warshaw's decision. More briefly, complainant began working for KG&E, on or about April 25, 1983, as a "walk-down" inspector of electrical systems. Complainant's primary duties were to determine whether the electrical equipment and its installation at the Wolfcreek plant met the quality assurance standards of both KG&E and NRC, and to identify and report existing or potential safety problems. Complainant was interviewed for his job by William Rudolf, Manager of Quality Assurance for KG&E. During the interview, Rudolf used a resume provided to KG&E by Volt Technical Services, a head hunting firm which referred complainant for the job. This resume listed, as part of complainant's educational background, "J.C. Calhoun University, Huntsville, AL, 1977, 20 hours credit in Electrical Systems." Complainant had not actually attended Calhoun University but had been advised by Calhoun that, if he were to attend, Calhoun would give him these credits for courses taken during his military service. The resume also noted that complainant had been employed at Daniels International, Houston, Texas from November 1978 to January 1979. After approximately two months on the job, complainant and twelve other quality assurance inspectors were called together for the purpose of filling out personal data history forms and release of information forms. On advice of the staff person handling this meeting, complainant listed the Calhoun University credits on his personal data form. Complainant also listed on this form his work experience at Daniels.

On the morning of June 20, 1983 complainant informed Rudolph of certain safety problems he had identified during his "walk-downs." On the afternoon of that same day,

complainant was called to a meeting in Rudolph's office at which Glenn W. Reeves, Superintendant of Quality Control and two security guards[2] were also present. At that meeting, complainant was told by Rudolph that he was discharged because of KG&E's concerns about his relationship with staff personnel as well as individuals outside of the company and because of the damaging of the company telephone. After complainant stated that he believed that the real reason he was being fired was that he had raised quality assurance and safety concerns, he was asked to temporarily leave the room. When called back to the meeting, complainant was told that he was not terminated but was being put on probation.

In the early part of July 1983, Equifax, an investigative firm under contract to KG&E, initiated background checks of complainant and the other quality assurance inspectors. The purpose of the background checks was to obtain the security clearance necessary for the issuance of unescorted badges to these inspectors. These badges would be needed sometime in August of 1984, a year hence. On July 13th, complainant submitted to Reeves a written report on specific quality assurance and safety concerns; the next day, Reeves gave this report to Rudolph. Around the same time, complainant brought to Rudolph's attention additional quality assurance and safety concerns, and inquired of Rudolph as to the status of the problems complainant had surfaced on June 20th. Rudolph responded that Reeves and he were investigating these problems. On August 2, 1983 complainant was advised, at a meeting with Personnel Manager Duane Smith, Chief of Security John Johnson and Reeves, that Equifax was

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2. The presence of the security guards was to assist in carrying out complainant's discharge.

unable to verify his educational credits from Calhoun and his employment at Daniels. Complainant thereupon stated that he never attended Calhoun but could produce a document which showed that he would be given degree credit for courses taken while in the military if he were to attend Calhoun, and that he could produce documentation verifying his employment at Daniels. Complainant was given until August 5th to produce such documentation; otherwise, complainant was told, he would be discharged.

On the morning of August 4th, complainant turned in for typing his handwritten notes concerning problems he had discovered with certain cable installations. Later in the day, Reeves took these notes out of the typing basket; he gave them to Rudolph the next day. Also, on the morning of August 4th, complainant notified Reeves that he needed to ask Rudolph for additional time to get his documentation from home. Additionally, sometime during the morning of the 4th, Rudolph informed Chief of Security Johnson that he was going to terminate complainant because he was certain that complainant would not be able to produce documentation of his attendance at Calhoun College. That same day, Rudolph told Reeves that he would not meet with complainant since it was complainant's last day on the job. Around noontime, Reeves told complainant that Rudolph would not meet with him since he (Rudolph) considered that the August 5th deadline was complainant's problem. Nevertheless, complainant waited till the end of the work day hoping to meet with Rudolph. On his way out of the plant that night, complainant was stopped by Chief of Security Johnson who advised him that Reeves wished to see him, and requested that complainant accompany Johnson to the security check point. There complainant met Rudolph and Reeves who had with them a box containing com-

plainant's personal desk items. Rudolph informed complainant that he was terminated because his background information could not be verified. Some two weeks after his termination, complainant informed Rudolph that the verifying documentation had been delivered to the KG&E Security Office. Rudolph thereupon told the complainant that he could not get his job back but that he would be given a good reference. On August 23, 1983, Equifax completed its investigation of complainant's background.

The administrative law judge concluded that complainant's reporting of quality discrepancies and safety problems constituted protected activity under Section 5851 albeit such reporting was within the scope of complainant's official duties as a quality assurance inspector and was communicated only internally and not to NRC. I accept this finding. It is in complete accord with my holding on the same issue in *Mackowiak v. University Nuclear Systems*, 82-ERA-8, slip op. pp. 8-11.

The administrative law judge then went on to conclude that KG&E's stated reasons for its June 20th discipline and August 4th discharge of complainant were pretextual. I agree with his evaluation of the evidence and adopt his conclusion.

KG&E asserts that complainant has failed to establish a prima facie case of discrimination in that he has not shown, either by direct or credible circumstantial evidence, that his protected activity was a substantial or motivating factor in his termination; and KG&E argues that, even if complainant established a prima facie case, KG&E has rebutted by articulating legitimate non-discriminatory reasons for discharging the complainant.

The applicable burdens and order of presentation of proof in Section 5851 cases are set forth in my decision

in *Dartey v. Zack Company of Chicago*, 80-ERA-2, slip. op. pp. 6-9.

There I held that:

> ". . . the employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, 'the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action.' (cite omitted) . . . If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. (cite omitted). If the employer successfully rebuts the employee's prima facie case, the employee still has 'the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . . . [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' (cite omitted) The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may

> conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. (cite omitted) Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had 'dual motives.'
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> . . . if the trier of fact reaches the latter conclusion, that the employer has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." (cites omitted).

Review of the record evidence shows that Wells carried this burden by establishing a prima facie case which KG&E did not rebut because the administrative law judge concluded its proffered reasons were pretextual. Thus, it was not necessary for the administrative law judge to consider the "but for" question of whether, given mixed legitimate and illegal motives for its actions against Wells, they would have been taken even in the absence of the protected activity.

Without question, complainant has shown that he was engaged in protected conduct, and that KG&E took adverse action against him. Additionally, the "sequence of topics and actions at the June 20, 1983 meeting (D&O, p.7)," the absence of any disciplinary problem in the 44 day period between complainant's probation on June 20, 1983 and his discharge on August 4, 1984, the fact that Equifax did not complete its background investigation un-

til 19 days after complainant's discharge, and KG&E's refusal to rehire complainant after he submitted his documentation, all constitute evidence, which, if credited, is sufficient to raise the inference that complainant's protected conduct was the likely reason for his discharge. The administrative law judge found this evidence credible and I concur in this determination.[4] Thus complainant has established a prima facie case of discriminatory discharge.

KG&E did articulate legitimate, non-discriminatory reasons for discharging the complaint. As noted in Dartey, however, presentation of such a reason does not end the inquiry. Complainant can prevail by demonstrating "that the proffered reason was not the true reason for the employment decision", *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Complainant can do this by proving by a preponderance of the evidence either that employer was more likely motivated by complainant's protected conduct or that the stated reason for complainant's discharge was in fact a pretext. *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 804 (1972); *Burdine*, at p. 256. "In short the [administrative law judge] must decide which party's explanation of the employer's motivation it believes." *U.S. Postal Service Board of Governors v. Aikens*, 103 S. Ct. 1478, 1482 (1983).

In concluding that employer's stated reasons were pretextual, Judge Warshaw thoroughly reviewed and weighed the evidence, and explained the inferences he drew there-

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4. KG&E also suggests that complainant has failed to establish a prima facie case because he did not prove that he was treated less favorably than other employees. Complainants are not required to prove that similarly situated individuals are treated differently. *DeFord v. TVA*, 700 F.2d 281 (6th Cir. 1983). Nevertheless, the record establishes that another employee, who was unable to substantiate graduation from high school, which is an employment requirement, was not discharged but allowed to take the high school equivalency test.

from. Although I do not agree with all of Judge Warshaw's intermediate conclusions,[5] I do agree that complainant has established by a preponderance of the of the evidence that KG&E's reasons for his termination were pretextual. The administrative law judge's finding on complainant's prima facie case together with his other findings - namely the failure of KG&E to investigate the complaints against complainant, the failure of KG&E to offer any counsel or warning prior to the June 20, 1983 meeting at which it planned to dismiss complainant, the disparate treatment accorded another employee who did not meet the educational prerequisites for employment with KG&E, the short period of time allowed complainant to produce the documentation as to his Calhoun College credits and his Daniel's employment, and the curtailment of that period,

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5. The administrative law judge found that complainants "[e]mployment at Daniel's fell outside the purview of the background investigation which is normally limited to the previous five years." (D&O, p. 11, fn. 2). The record evidence clearly established the period of complainant's employment at Daniels as between November 1978 to January 1979. The five year period thus would not have elapsed until January of 1984, seven months after complainant filled out the personal history form. Employment at Daniel's was, therefore, within the "previous five years." However, the importance of the Daniel's employment is not when it occurred but that complainant could and did eventually provide the necessary verification and that KG&E did not wait for and did not accept the verifying documentation.

The administrative law judge also found that the discharge action "was taken contrary to Respondent's progressive disciplinary policies" (D&O, p. 15). The only record evidence as to KG&E's disciplinary policies is found in the testimony of Rudolph, who responded affirmatively to the judge's question as to whether KG&E follows a system of progressive discipline. Rudolph did not give any details as to the requirements of the KG&E system but merely indicated that he did not agree with the judge's statement that a verbal reprimand was of lesser degree than a written reprimand. Proof that KG&E did not follow its disciplinary policies in terminating complainant is not a requirement for a finding of pretext, since termination can be illegally motivated even where the employer follows to the letter his established disciplinary system.

the significance of Reeves' removal of complainant's discrepancy report from the typing box and the date stamping thereof, and the refusal of KG&E to re-employ the complainant, are sufficient to support the conclusion that it has been established by a preponderance of the evidence that KG&E's reasons for termination of complainant are pretextual. Accordingly, I find that KG&E's termination of complaint is in violation of section 5851.

Therefore, Kansas Gas and Electric Company is Ordered:

1. To reinstate Complainant, James E. Wells, Jr., to his former or to a substantially equivalent quality assurance inspector position;
2. To pay to Complainant, James E. Wells Jr., all wages and compensation (including the 168.00 per week stipend) that he would have received from the date of his termination to the date of his re-instatement;
3. To pay interest on the amount of wages and compensation provided in item 2 above at the rate prescribed by 28 U.S.C. 1961;
4. To expunge from its records all memoranda and or reference to the disciplinary action taken against complainant James E. Wells, Jr., as well as any reference of its refusal to re-employ him after August 4, 1983;
5. To post on the bulletin boards of its Wolf Creek Generating Plant facility in Burlington, Kansas a copy of this order for a period of thirty days; and
6. To pay to complainant's attorneys, Guy, Helbert, Bell & Smith, all costs and expenses advanced by them in bringing this complaint as well as their reasonable attorney fees.

/s/ Raymond J. Donovan
Secretary of Labor

APPENDIX C

(Filed October 15, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION NO. 84-2290

JAMES E. WELLS, JR.,
Plaintiff,

v.

KANSAS GAS AND ELECTRIC CO., and its WOLF CREEK NUCLEAR GENERATING PLANT,
Defendant.

MEMORANDUM AND ORDER

This matter is before the court on plaintiff's motion for judgment on the pleadings or in the alternative to strike paragraphs three (3) through six (6) of defendant's answer. Plaintiff seeks enforcement of an order of the Secretary of Labor, dated June 1, 1984, finding that defendant had violated Section 5851 of the Energy Reorganization Act of 1974, as amended 42 U.S.C. 5801, *et seq.*, and ordering reinstatement of plaintiff to his former position.

Section 5851(e) grants the district court jurisdiction by the Secretary without regard to amount in controversy or citizenship of the parties. The court may award costs of litigation to any party whenever it is determined to be appropriate. Section 5851(c) provides for review of the Secretary's order in the United States Court of Appeals. That section specifically states, "The commence-

ment of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order."

Defendant argues that the relief ordered by the Secretary is inappropriate because plaintiff's job is no longer in existence and further new security requirements require employees to successfully pass psychological evaluations. Defendant asserts these factors create a factual issue precluding entry of judgment on the pleadings. Further, defendant argues that §5851(d) grants this court jurisdiction to determine the appropriateness of the relief ordered by the Secretary. Section 5851(d), when read in its entirety, provides:

> (d) *Jurisdiction*
>
> Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

This provision is clear on its face that the district court has jurisdiction to grant appropriate relief through its enforcement of an order by the Secretary. It cannot be interpreted to authorize this court to inquire into the appropriateness of the relief ordered by the Secretary. Courts should not engage in "contortions" to reason clear statutory language out of a statute. *DeFord v. Secretary of Labor,* 700 F.2d 281, 288 (6th Cir. 1983). Section 5851(c) clearly provides for review of the Secretary's order

in the United States Court of Appeals. That provision further provides for the Court of Appeals to issue a stay when deemed necessary. This court is without jurisdiction to inquire into these issues.

Under 42 U.S.C. 5871(e)(2), this court is authorized to award reasonable attorney's fees to plaintiff. Having found such award to be appropriate, plaintiff is hereby given ten (10) days from the date this order is filed to file affidavits indicating a reasonable amount for attorney's fees. Defendant shall be given ten (10) days to respond thereto.

IT IS BY THE COURT THEREFORE ORDERED that plaintiff's motion for judgment on the pleadings is hereby granted and defendant is directed to comply with the order of the Secretary of Labor.

IT IS FURTHER ORDERED that plaintiff is hereby given ten (10) days from the date this order is filed to file affidavits in reference to attorney's fees.

IT IS FURTHER ORDERED that defendant is granted ten (10) days to then respond thereto.

DATED: This 15th day of October, 1984, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge